SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. [redacted] 188

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr. deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners,

-vs-

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1526

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr. deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners,

-vs-

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

BRIEF OF RESPONDENT

JURISDICTION

The Petitioners seek to invoke, but improvidently, the jurisdiction of this Court under §1254, Title 28, United States Code. No basis for this invocation is stated except the Petitioners' unsupported conclusion that the matter involved is controlled by the local law of Florida which had not been construed by the appellate courts of Florida.

QUESTION INVOLVED

The Respondent submits that the question involved is whether there exists a federal constitutional question, which is dependent upon a determination of an uncertain issue of state law.

STATEMENT OF THE CASE

The Petitioner's statement of the case is substantially correct but omits certain salient aspects of the agreement sued upon, to-wit:

> "(2) MacDonald shall have the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seating; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate." (R. 6)

Further, in paragraph 9 of said agreement, is the following:

> "(9) MacDonald agrees to indemnify and save harmless Inter-Continental from any and all liability arising out of the acts of neglect of him-

self, his agents, servants, employees, or independent contractors, or from any other liability arising out of the staging of said live gate promotion." (R. 8-9)

The pugilistic contest was held on February 25, 1964, (R. 26-27) and the agreement or contract completely performed by Respondent (R. 3). The United States Court of Appeals for the Fifth Circuit reversed the trial court on two bases: (1) the contract was not unlawful on its face because it was capable of being performed lawfully and that the defense of unlawfulness was an affirmative defense to be raised by Petitioner's answer; and (2) that the complaint should not have been dismissed for failure to state a claim unless it appeared to a certainty that the Respondent would be entitled to no relief under any state of facts which could be proved.

REASONS WHY WRIT SHOULD NOT BE GRANTED

The Petitioners, after the opinion and decision of the Court of Appeals had been handed down, then conceived the idea of requesting that Court to obtain from the Supreme Court of Florida an interpretation of the statutes involved. See Rule 4.61, Florida Appellate Rules. That an interpretation of the Florida Statutes is unnecessary and no federal constitutional question exists which is dependent upon such interpretation, the Respondent will hereinafter seek to demonstrate.

Federal courts are vested with discretion to invoke or decline to invoke the so-called doctrine of abstention. This doctrine is usually invoked by federal courts postponing the exercise of their jurisdiction in deference to state

court resolutions of underlying issues of state law. See RAILROAD COMMISSION v. PULLMAN CO., 312 U. S. 496, 85 L.Ed. 971, 61 S.Ct. 643. This is especially true where the resolution of a federal constitutional question is dependent upon or may be materially altered by the determination of an uncertain issue of state law. However, the doctrine contemplates that deference to state court adjudications be made only where the issue of state law is uncertain. DAVIS v. MANN, 377 U.S. 678, 690, 12 L. Ed.2d 609, 616, 84 S.Ct. 1453; McNEESE v. BOARD OF EDUCATION, 373 U.S. 688, 673-674, 10 L.Ed. 2d 622, 626, 83 S.Ct. 1433; CHICAGO v. ATCHISON T. & S.F. R. CO., 357 U.S. 77, 84, 2 L.Ed.2d 1174, 1180, 78 S.Ct. 1063.

Federal jurisdiction of the action sub justice was based upon a diversity of citizenship. No federal constitutional question was raised in the trial court. The unenforceability of the agreement sued upon under the terms of the Florida Statute covering prize fights was the main issue urged by the petitioners in the trial court. Consequently, the issue as to the construction to be placed upon the state statute covering prize fights was not necessary to the decision of any federal constitutional question for the very simple reason that no such issue was posed to the trial judge or to the Court of Appeals. In HARMAN v. FORSSENIUS, 380 U. S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965), this Court said:

> "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of

the federal court to exercise its properly invoked jurisdiction. Baggett v. Bullitt, 377 U.S. 360, 375-379, 12 L.Ed.2d 377, 387-389, 84 S. Ct. 1316."

It can be readily seen, first, that the state statute in question is not so vague and uncertain as to require a resolution by a state tribunal, and secondly, that a federal constitutional question is not dependent upon a state court construction. The discretion is vested in the federal courts to remit relevant issues to state courts where the decision upon a relevant state statute would affect, modify, or materially alter a determination of the underlying federal constitutional question. The petitioners have not demonstrated to this Court what the federal constitutional question is that may be affected by a state court construction of the Florida Statutes. As a matter of fact, it is not even claimed that such a question existed in the case in the trial court or in the Court of Appeals. The mere fact that the public policy of the State of Florida may be involved in the construction of the Florida Statutes and the further fact that procedural machinery is provided to obtain a ruling on state law from the highest court of the State of Florida, does not justify a federal court in abdicating or staying the exercise of its jurisdiction for the purpose of obtaining an abstract opinion on a non-controlling issue.

Petitioners have cited this Court to its opinion in UNITED GAS PIPE LINE CO. v. IDEAL CEMENT CO., 369 U.S. 134, 82 S.Ct. 676 (1962) wherein the Court was concerned with the interpretation of the License Code of the City of Mobile, Alabama. A close examination of this case will disclose that there was an underlying federal constitutional question, to-wit: the imposition of a tax

under the License Code of the City of Mobile on what was claimed to be interstate commerce. If the Alabama court determined that the License Code of the City of Mobile was unconstitutional as placing a burden upon interstate commerce, or was otherwise invalid, then the issue before the federal court would have been resolved. However, if the issue was decided by the Alabama courts to the contrary, that is to say, that the License Code of the City of Mobile was not unconstitutional, then the federal courts would have been in a position to determine whether or not the License Code violated the interstate commerce clause of the Federal Constitution. The case sub judice and UNITED GAS PIPE LINE CO. v. IDEAL CEMENT CO., are not analogous on the facts nor do they pose analogous points of law.

The Petitioners also cite this Court to its opinion in ALDRICH v. ALDRICH, 375 U.S. 75, 84 S.Ct. 184 (1936), as an example of the certification of a state law to the Supreme Court of Florida. The ALDRICH case was a certiorari to this Court to review a West Virginia judgment that denied full faith and credit to a Florida divorce decree insofar as the decree made the ex-husband's estate liable for alimony accruing after his death. The underlying question was whether or not the West Virginia courts had accorded full faith and credit as they were required to do under the Federal Constitution to the Florida judgment. This Court certified the matter to the Supreme Court of Florida in order to obtain a ruling from that tribunal on the question relating to the permissibility and conclusiveness of the divorce decree under the domestic law of Florida. Obviously ALDRICH v. ALDRICH, supra, involved the underlying federal constitutional question then pending before a federal tribunal and was dependent to

a great extent upon a determination of state law on the question of whether or not the Florida divorce decree was final. If it was final, then the federal courts would determine whether or not the West Virginia courts had failed to accord the decree full faith and credit under the Federal Constitution. No such question exists in the case sub judice.

The doctrine of abstention is invoked at the discretion of the federal tribunal in which the cause of action is pending. Therefore, unless it is shown that the federal court has abused its discretion in failing to invoke the doctrine, then certiorari should not lie. Such an abuse has not been made to appear. The petitioners seem to suggest that the doctrine established in ERIE R. CO. v. TOMPKINS, 304 U.S. 64, 58 S.Ct. 817, is applicable to the case sub judice because of the grave significance arising from the relationship between the state and federal judicial systems. It is further suggested that there is a hesitancy and diffidence on the part of the United States Court of Appeals to submit questions of local law to the highest courts of the states involved and that this hesitancy and diffidence should be brought to an end by this Court's granting certiorari. We respectfully submit that the courts of appeal have never been hesitant or diffident in submitting such issues to the state tribunals where the construction to be placed upon the state law involved would have a bearing upon, modify, alter or even determine the underlying federal constitutional question. No claim is made in this cause that such a federal constitutional question exists.

The petitioners contended in the trial court and the Court of Appeals that the Florida Statute covering prize

fights was valid and should be construed to render unenforceable the agreement between the parties. No effort was made in the trial court to obtain a construction of the Florida Statute and it was only after the decision and opinion of the Court of Appeals had been handed down did it occur to the petitioners that a construction of the statute was necessary or expedient.

CONCLUSION

Based upon the foregoing authorities and argument in support thereof, the petition for certiorari should not be granted and the judgment of the United States Court of Appeals for the Fifth Circuit should not be disturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent has been mailed to MARION E. SIBLEY, ESQ. and ROBERT C. WARD, ESQ., Attorneys for Petitioners, 605 Lincoln Road, Miami Beach, Florida 33139, this 10 day of July, A. D., 1968.

s/ Murray Adams Jr